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No. 91-318



# In the Supreme Court of the United States

OCTOBER TERM, 1991

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EDWIN S. LELAND, PETITIONER

*v.*

FEDERAL INSURANCE ADMINISTRATOR, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT*

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## BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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## QUESTION PRESENTED

Whether the Upton-Jones Amendment to the National Flood Insurance Program, which provides coverage for the costs of relocating structures threatened by floods, applies retroactively to losses occurring prior to the amendment's effective date.

## TABLE OF CONTENTS



## TABLE OF AUTHORITIES

Cases:



Statutes and regulation:



Miscellaneous:

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A21) is reported at 934 F.2d 524. The opinion of the district court (Pet. App. A22-A32) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on May 22, 1991. The petition for a writ of certiorari was filed on August 20, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

1. The purposes of the National Flood Insurance Program, see 42 U.S.C. 4001 *et seq.*, include provid-

ing otherwise unavailable flood insurance protection to property owners in flood-prone areas. Owners purchase their policies from private insurance companies. The scope of the coverage, however, is prescribed by federal law, including a Standard Flood Insurance Policy (SFIP) set forth in 44 C.F.R. Pt. 61, App. A(1). The federal government provides financial support for the program.

During the period relevant to this case, the SFIP did not provide coverage for relocation costs—*i.e.*, the costs of moving buildings that are threatened by flooding. In 1988, however, Congress enacted the Upton-Jones Amendment, 42 U.S.C. 4013(c). Subject to various limitations and conditions, that amendment provides for reimbursement of the costs of relocating or demolishing structures, as follows (42 U.S.C. 4013(c)(1)):

> If any structure covered by a contract for flood insurance under this subchapter and located on land that is along the shore of a lake or other body of water is certified by an appropriate State or local land use authority to be subject to imminent collapse or subsidence as a result of erosion or undermining caused by waves or currents of water exceeding anticipated cyclical levels, the Director [of the Federal Emergency Management Agency] shall (following final determination by the Director that the claim is in compliance with regulations developed pursuant to paragraph (6)(A)) pay amounts under such flood insurance contract for proper demolition or relocation * * *.

The amendment's effective date was February 5, 1988.

2. Petitioner is the owner of a beachfront residence in Topsail Beach, North Carolina. In March 1985, petitioner purchased a standard flood insurance policy from respondent United Services Automobile Association (USAA). The policy term was three years. As issued, the policy did not cover the physical relocation of a dwelling which had sustained structural damage due to flooding. Pet. App. A3-A4.

On December 2, 1986, January 1, 1987, and February 27, 1987, severe winter storms struck the coast of North Carolina, including the Topsail Beach area. Petitioner contends that the storms constituted "floods" within the meaning of his policy and that they caused substantial damage to his residence. On March 17, 1987, officials of Topsail Beach advised petitioner that his residence was unfit for human habitation and that condemnation proceedings were being initiated. In November 1987, city officials warned petitioner that the residence was in danger of imminent collapse. Pet. App. A4-A6.

Petitioner then relocated his residence to a lot farther from the beachfront. The physical relocation of the dwelling was complete in November 1987, several months before the effective date of the Upton-Jones Amendment. The residence was ready for occupancy when the septic tank was installed and approved on February 8, 1988, three days after the amendment's effective date. Pet. App. A6.

After relocation of his residence, petitioner submitted a claim for relocation costs of $24,367.74 to the Federal Energy Management Agency, the agency that administers the National Flood Insurance Program. The claim was denied on the grounds, *inter alia*, that relocation of the dwelling was not compensable under the standard flood insurance policy

held by petitioner at the time of loss and that the Upton-Jones Amendment does not apply retroactively. Pet. App. A6.

3. Petitioner then filed this action against the Federal Insurance Administrator (the FEMA official responsible for the flood insurance program) and USAA. While he conceded that his flood insurance policy, in the form in which it was issued, did not cover relocation costs (see Pet. App. A7), petitioner argued that he was entitled to coverage under the Upton-Jones Amendment. The district court granted summary judgment in favor of the Administrator and USAA. The court held that the Upton-Jones Amendment does not apply retroactively to losses occurring before its effective date, and it rejected petitioner's contention that the loss was covered in any event because it was not complete until February 8, 1988, when his septic tank was finished. *Id.* at A29-A32.

4. The court of appeals affirmed, relying on the "fundamental and well established principle of law * * * that statutes are presumed to operate prospectively unless retroactive application appears from the plain language of the legislation." Pet. App. A10. The court rejected petitioner's contention that 42 U.S.C. 4013(c)(4)(A)—which provides that "[t]he provisions of this subsection shall apply to contracts for flood insurance under this chapter that are in effect on, or entered into after, February 5, 1988"—warranted a departure from that general rule. The purpose of Section 4013(c)(4)(A), the court found, was merely to "provide[] for application of the amendment to those standard flood policies which were in effect on the date of the amendment's enactment on February 5, 1988, and to those issued thereafter, without the necessity of amending such policies

to reflect the new statutory coverage." Pet. App. A11.

The court found further support for its conclusion in cases construing the SFIP's "liberalization clause," which provides existing policyholders with the benefit of any favorable changes to the standard coverage. Under those decisions, the court of appeals noted, the liberalization clause "does not give retroactive effect to new SFIP terms; rather, it serves as a device for automatically reading into existing policies beneficial changes as soon as FEMA makes them and declares them to be in force." Pet. App. A12 (quoting *Criger* v. *Becton*, 902 F.2d 1348, 1352 (8th Cir. 1990)). The court held that "an intent for retroactive application of the [Upton-Jones Amendment] is discernable from neither the language of the amendment itself nor from any other indication of congressional intent." Pet. App. A15.

The court also rejected petitioner's contention that his loss was not complete until February 8, 1988, when the septic tank at the relocated residence was completed and the dwelling was approved for occupancy. The court noted that a number of decisions have recognized a "loss-in-progress" principle—embodied in a clause in petitioner's own policy—under which federal flood insurance is held not to apply to flooding that commences before the beginning of the policy term. Pet. App. A18-A19. The rationale underlying that principle, the court reasoned, logically applies to statutory amendments broadening coverage during the term of a policy. *Id.* at A20.

## ARGUMENT

The court of appeals' conclusion that the Upton-Jones Amendment does not apply retroactively is well-founded. As petitioner recognizes (Pet. 6), the decision in this case is the only one addressing the retrospective application of that provision. Because the question presented by the petition can arise only with respect to losses occurring prior to February 5, 1988, it has no continuing significance. Further review is not warranted.

The court of appeals correctly identified the general principle that governs this case. Pet. App. A13-A14. "Retroactivity is not favored in the law. Thus, congressional enactments * * * will not be construed to have retroactive effect unless their language requires this result." *Bowen* v. *Georgetown University Hospital*, 488 U.S. 204, 208 (1988). See *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, 494 U.S. 827, 834 (1990); *Bennett* v. *New Jersey*, 470 U.S. 632, 639 (1985); *United States* v. *Security Industrial Bank*, 459 U.S. 70, 79 (1982); *Greene* v. *United States*, 376 U.S. 149, 160 (1964); *United States* v. *Magnolia Petroleum Co.*, 276 U.S. 160, 162-163 (1928).[1]

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[1] The amendment at issue in this case defines substantive rights and liabilities—specifically, the extent of the risk assumed under flood insurance policies. Thus, this case does not present the issue debated by Members of this Court in *Kaiser Aluminum & Chemical Corp.* v. *Bonjorno*, *supra*. That case, like *Bradley* v. *School Board*, 416 U.S. 696 (1974), concerned the retroactivity of a statutory provision authorizing courts to award certain relief. The retroactive application of such provisions to pending lawsuits is an issue very different from the retroactive extension of an insurance policy. See *Bennett* v. *New Jersey*, 470 U.S. at 639-640.

There is no merit to petitioner's contention that 42 U.S.C. 4013(c)(4)(A) mandates retroactive application of the amendment. That provision states that the Upton-Jones Amendment "shall apply to contracts for flood insurance under this chapter that are in effect on, or entered into after, February 5, 1988." As both the district court and the court of appeals recognized, however, Section 4013(c)(4)(A)'s self-evident purpose was to make the amendment immediately effective without a corresponding amendment to the SFIP or regulations establishing the scope of standard flood-insurance coverage. Pet. App. A11, A29-A30.[2] There is no indication that Congress intended, in addition, to make the broadened coverage applicable to losses that had previously materialized.[3]

The court of appeals' decision is consistent with other cases addressing an analogous issue. *Criger* v. *Becton, supra; Wright* v. *Director, Federal Emergency Management Agency*, 913 F.2d 1566, 1569-1574 (11th Cir. 1990). In those cases, the courts refused to give retroactive effect to a change in the

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[2] The excerpt from the conference report on which petitioner relies (Pet. 8) simply paraphrases the language of the statute. H.R. Conf. Rep. No. 426, 100th Cong., 1st Sess. 236-237 (1987).

[3] Indeed, under petitioner's view, the availability of coverage conferred by the amendment would turn on a fortuity. Suppose that two neighbors were continuously insured under a succession of three-year flood insurance policies and that both had insurance policies in effect on February 5, 1988, but that the dates on which they had renewed those policies were different. Under petitioner's view, the Upton-Jones Amendment would relate back farther for one insured than for the other. There is no reason to suppose that Congress intended to distinguish between insureds on that basis.

SFIP that narrowed an exclusion in standard flood insurance coverage.

Petitioner argues (Pet. 9) that retroactive application of the Upton-Jones Amendment would be consistent with its policy of encouraging owners of property threatened by flooding to salvage some portion of its value. The scheme that Congress selected to advance that policy, however, includes several elements, not all of which can readily be applied retroactively. The Upton-Jones Amendment confers coverage for relocation and demolition costs, but makes that coverage contingent upon certain determinations and limits the insured's recovery to a fixed percentage of the property's value. Significantly, if it is determined that an owner whose property is subject to the amendment has failed to take appropriate action to relocate or demolish the property, coverage may be limited to the amount that would have been provided had he acted reasonably. Viewed as a whole, that scheme has all the earmarks of a program intended to apply only prospectively. In any event, there is nothing that might rebut the presumption against retroactive application.

As both lower courts held, payment of petitioner's relocation costs cannot be justified on the theory that some portion of his loss occurred after the effective date of the Upton-Jones Amendment. The only event that postdated the amendment's effective date was the completion of the new septic system for the relocated dwelling. The damage that prompted the relocation all predated the effective date of the Upton-Jones Amendment; by that date, petitioner's loss had long since ceased to be an insurable risk. Petitioner's suggestion that the timing of a loss should be tied to the completion of measures to repair or miti-

gate flood damage would give insureds power over the availability of insurance coverage.

Courts have consistently denied coverage under the National Flood Insurance Program for losses caused by flooding that commences prior to the effective date of a policy. See *Mason Drug Co.* v. *Harris*, 597 F.2d 886, 887-888 (5th Cir. 1979); *Summers* v. *Harris*, 573 F.2d 869 (5th Cir. 1978); *Drewett* v. *Aetna Casualty & Surety Co.*, 539 F.2d 496, 498 (5th Cir. 1976). The principle underlying those decisions—that insurers may not be deemed to have assumed the risk of a loss that has already materialized by the time they issue coverage—applies to extensions of coverage occurring during the policy term.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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